Supreme Court, U.S.
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No. 97-58

IN THE

Supreme Court of the United States

OCTOBER TERM, 1996

LYNN DOHERTY, Director of the Illinois Department of Employment Security, in her official capacity,

Petitioner,

v.

LUELLA PENNINGTON, individually and on behalf of other similarly situated persons,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

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SUPPLEMENT TO THE PETITION FOR WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 15.8, the Petitioner, Lynn Doherty, Director of the Illinois Department of Employment Security ("IDES"), brings to the attention of the Court legislation enacted after the July 3, 1997 filing of her petition (docketed July 8, 1997).

A. New Legislation

On August 5, 1997, H.R. 2015 (the "Balanced Budget Act of 1997") was signed into law as Public Law 105-33, 111 Stat. 251. As relevant to this case, the legislation provides:

> **Subtitle E—Unemployment Compensation**
>
> **SEC. 5401. CLARIFYING PROVISION RELATING TO BASE PERIODS**
>
> (a) IN GENERAL.—No provision of a State law under which the base period for such State is defined or otherwise determined shall, for purposes of section 303(a)(1) of the Social Security Act (42 U.S.C. 503(a)(1)), be considered a provision for a method of administration.
>
> (b) DEFINITIONS.—For purposes of this section, the terms "State law", "base period", and "State" shall have the meanings given them under section 205 of the Federal-State Extended Unemployment Compensation Act of 1970 (26 U.S.C. 3304 note).
>
> (c) EFFECTIVE DATE.—This section shall apply for purposes of any period beginning before, on, or after the date of the enactment of this Act.

Pub. L. No. 105-33, 111 Stat. 251, Title V, Subtitle E, § 5401 (Aug. 5, 1997).

Pursuant to this new legal standard, state statutory "base periods", determining entitlement to unemployment insurance benefits, are not methods of administration for purposes of section 303(a)(1) of the Social Security Act ("Act"), which is the "when due" clause (42 U.S.C. § 503(a)(1)). Further, the law applies to "any period beginning before, on, or after" the legislation's August 5, 1997 effective date.

B. Relevance And Application To The Present Case

As discussed in the pending petition (Petition at 3-8), in 1994, the Court of Appeals held in *Pennington I* that Illinois' base period was a method of administration subject to section 303(a)(1) of the Act. *Pennington v. Didrickson,* 22 F.3d 1376 (7th Cir. 1994) (App. 16). In the 1997 *Pennington II* decision, the Court of Appeals affirmed the district court's decision on remand, which found the base period violated the when due clause and enjoined its use with respect to the plaintiff class. *Pennington v. Doherty,* 100 F.3d 502 (7th Cir. 1997) (App. 1).[1]

Under the new legislation, base periods are not deemed methods of administration, contrary to the *Pennington I* holding; as a result, such periods also cannot be subject to the Act's when due clause requirements. The Petitioner submits that this new law must be applied to reverse *Pennington I* and *Pennington II.*

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[1] The pending petition raised, and this Court has jurisdiction over, the question of law raised in *Pennington I,* namely, whether a base period is a state eligibility criterion or a method of administration. *See Mercer v. Theriot,* 377 U.S. 152, 153-54 (1964) (questions raised in first and second appeals properly before this Court).

The relief afforded by the lower courts was an injunction against IDES' application of the base period to the plaintiff class. Relief by injunction however, operates "*in futuro*" and the plaintiff class has no "vested right" in the injunction while it is subject to review. *American Steel Foundries v. Tri-City Central Trades Council,* 257 U.S. 184, 201 (1921) (cited and quoted in *Landgraf v. USI Film Products,* 511 U.S. 244, 114 S. Ct. 1483, 1501 (1994)). Accordingly, where legislation governing the propriety of the injunction is enacted while the judgment is pending on appeal, the court of review is obliged to apply the new statute. *Landgraf,* 114 S. Ct. at 1501; *American Steel,* 257 U.S. at 201. *See also Pennsylvania v. Wheeling and Belmont Bridge Co.,* 59 U.S. (18 How.) 421, 15 L. Ed. 435, 436-37 (1856) (where Act declared a bridge to be lawful, after this Court adjudicated it an obstruction, injunctive aspect of the decree cannot be enforced). Thus, here, the injunction must fail in light of the new legislation.

Application of the intervening legislation in cases like this is not retroactive. *Landgraf,* 114 S. Ct. at 1501. Even to the extent the new law might be argued to have some retroactive effect, however, it would still meet the standards for applying the law in effect at the time of review. While this Court has recognized a tension between application of the current law and the presumption against retroactivity, it has found no conflict between these principles when congressional intent for retroactive application is clear. *See Landgraf,* 114 S. Ct. at 1501; *Kaiser Aluminum & Chemical Corp. v. Bonjorno,* 494 U.S. 827, 836-37 (1990). Requiring the clear intent of Congress assures that it has affirmatively considered and accepted the effect of retroactive application. *Landgraf,* 114 S. Ct. at 1501.

In *United States v. Schooner Peggy,* 1 Cranch 103, 2 L. Ed. 49, 50 (1801), new legislation applied to property "not yet definitely condemned" and therefore to the Schooner Peggy on appeal. The *Schooner Peggy* Court announced the principle that "if, subsequent to judgment, and before the decision of the appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied." 2 L. Ed. at 51. "[T]he court must decide according to existing laws, and if it be necessary to set aside a judgment, rightful when rendered, but which cannot be affirmed but in violation of law, the judgment must be set aside." *Id. See also Landgraf,* 114 S. Ct. at 1501 (citing *Schooner Peggy* as authority for applying new, retroactive legislation to cases pending on appeal).

In the recently enacted legislation, Congress evidenced its clear intent to make section 5401 apply to "any period beginning before, on, or after" the enactment of what became Pub. L. No. 105-33. Plainly, Congress intended its legislation to reach and affect all unemployment claims, whether filed before, on or after the enactment of section 5401. Assuming the legislation were considered retroactive, the Court of Appeals' judgment still could not stand.

In light of this intervening legislation, this Court may wish to consider summary reversal pursuant to Supreme Court Rule 16.1. In the alternative, the Petitioner requests that this Court grant the petition for writ of certiorari, vacate the judgment of the Court of Appeals, and remand the case for further consideration in light of Title V, Subtitle E, section 5401 of Pub. L. No. 105-33. *See Bureau of Economic Analysis, United States Dep't of Commerce v. Long,* 454 U.S. 934 (1981).

CONCLUSION

For these additional reasons and for those presented in the petition, the Director of the Illinois Department of Employment Security respectfully asks this Court to grant a writ of certiorari and summarily reverse the opinion and judgment of the United States Court of Appeals for the Seventh Circuit, or accept the judgment for review by this Court, or vacate the judgment and remand this case to the Court of Appeals for further consideration.

Respectfully submitted,

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